IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 27, 2007

McARTHUR SHARP v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Bradley County
No. M-05-197 Carroll L. Ross, Judge

No. E2006-00341-CCA-R3-PC - Filed July 23, 2007

The petitioner, McArthur Sharp, pled guilty to two counts of the sale of less than .5 grams of cocaine, Class C felonies; one count of the sale of .5 grams or more of cocaine, a Class B felony; and violation of probation. He was sentenced to an effective term of eighteen years imprisonment. Thereafter, he filed a petition for post-conviction relief, which the court denied after a hearing. On appeal, he argues that the post-conviction court erred in denying relief because he received the ineffective assistance of counsel which caused him to enter unknowing and involuntary guilty pleas. Following our review of the record and the parties' briefs, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ROBERT W. WEDEMEYER, JJ., joined.

Sean G. Williams, Cleveland, Tennessee, for the appellant, McArthur Sharp.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Jerry N. Estes, District Attorney General; and John H. Bledsoe and Shari Young, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION
BACKGROUND

On August 12, 2004, the petitioner pled guilty to two counts of the sale of less than .5 grams of cocaine and one count of the sale of .5 grams or more of cocaine in case numbers 02-872, 02-873, and 02-874. For these offenses, the petitioner was sentenced to an effective term of twelve years to

be served as a Range II offender.[1] The petitioner also had a 1999 conviction for the sale of less than .5 grams of cocaine for which he was on probation at the time he committed the present offenses. As a result, the petitioner also pled guilty to violation of probation, and his prior six-year sentence was placed into effect. The court ordered that the petitioner's twelve-year sentence run consecutively to the six-year sentence for a total effective sentence of eighteen years.

At the guilty plea hearing, the state recited the factual basis for the petitioner's pleas as follows:

> [A]ll three of these cases are confidential informant cases, a confidential informant working with the Cleveland Police Department. In each instance, he was searched. His vehicle was searched. No contraband or weapons were there. . . . [T]he informant was fitted with a body wire, given confidential money. He went and met with [the petitioner] on all three occasions and purchased cocaine, crack cocaine from him. . . .

The petitioner filed a petition for post-conviction relief on May 11, 2005, and an evidentiary hearing was conducted on October 14, 2005. At the hearing, the petitioner testified that he went to a psychiatric facility prior to pleading guilty in this case and thought it was counsel who sent him to the facility. The petitioner only remembered meeting with counsel two times at the beginning of his representation and then did not see him again for four months when he went to court. Counsel told the petitioner it was in his best interest to plead guilty. The petitioner said that counsel did not go over the evidence with him, and he did not remember counsel playing any audiotapes for him. The petitioner stated that counsel told him the confidential informant's name, but he could not remember it. The petitioner also stated that counsel told him on the day of trial that the confidential informant was white, which surprised counsel because counsel thought the informant was black.

The petitioner recalled that he pled guilty on the day his trial started, and they were in the process of selecting the jury when he decided to plead guilty. The petitioner testified that he met with counsel, and counsel told him that he did not stand a chance and should "cop out." He remembered that counsel told him that the only way he could possibly have a chance at trial was to testify so the jury could hear his voice, but he did not want to testify. The petitioner stated that he had since listened to the recordings of the drug transactions and said that he did not think he would have pled guilty had he heard the tapes beforehand because his voice was not on any of the tapes.

The petitioner admitted that the day the trial was to start he did not inform counsel that he was anxious and not feeling well. The petitioner also admitted that he did not tell counsel that he was on medication that day and said that he did not tell the trial court the truth when asked if he had taken any medication. He explained that he did not tell the truth because he thought it was in his "best interest to take the 12 years." When asked by the court why he lied, the petitioner said he

---

[1] The record indicates that the petitioner was a Range III offender, but as part of the plea agreement he was allowed to plead as a Range II offender.

wanted to "get out of [the courtroom] and go back and lay in [his] room" because he had a massive headache.

The petitioner stated that when he pled guilty, he believed the sentence for violation of probation was to be served at 30 percent when in fact it was to be served at 35 percent. The petitioner agreed that he pled guilty on that earlier offense and received six years at 35 percent even though at the time he thought it was 30 percent. The petitioner testified that he talked to an inmate legal advisor, and the advisor told him that he had seen people who had committed more heinous crimes than the petitioner who were serving less time. The inmate advisor offered to review the evidence against the petitioner and wrote a letter to counsel, but counsel never responded to the letter. The petitioner stated that his post-conviction counsel had since showed him the proof against him and some of the information was not true. He said that he did not live in the house where one of the drug transactions occurred, and he would not have pled guilty had he known the evidence against him. The petitioner testified that counsel never discussed filing a motion to sever the counts for trial or filing a motion to continue based on the petitioner's anxiety the morning of trial.

On cross-examination, the petitioner testified that he did not know his sentence for the drug-related convictions would run consecutively to his sentence for violation of probation, even though the court informed him of such during the plea colloquy. The petitioner stated that he did not understand the legal system even though he had at least nine prior convictions. The petitioner also stated that no one had ever explained to him what Range II or Range III meant.

Wendy Carroll, a registered nurse and medical clinic administrator for the county jail, testified that she reviewed the petitioner's medical records, and the petitioner was taking Clonidine, Paxil, and Elavil the week he pled guilty. Nurse Carroll stated that Clonidine was a blood pressure medication, and Paxil and Elavil were for depression. Nurse Carroll said that to her knowledge Clonidine did not affect one's ability to think, and Paxil and Elavil may make one sleepy.

Trial counsel testified that he had been an attorney since 1991, and his practice consisted of domestic relations, criminal law, and personal injury. Counsel said that he was appointed by the court to represent the petitioner, and he met with the petitioner on several occasions. Counsel recalled that the first couple of meetings were to get acquainted and discuss the charges. He further recalled that leading up to trial, they had more intense meetings about the evidence, potential problems, and possible resolutions. Counsel remembered that the petitioner appeared to understand when they discussed the various aspects of his case.

Counsel stated that he went over the enhancement notice with the petitioner and said he was sure he discussed the range of punishment for a Range III offender with him. Counsel also stated that he discussed the petitioner's prior criminal record with one of the petitioner's former attorneys. Counsel said that he did not have an independent recollection of playing the tapes from the "drug sting" with the petitioner, but he said he was almost positive he did because he remembered a discussion about the quality of the tapes. Counsel elaborated that the audiotape from one of the transactions was of poor quality, and he questioned whether the state would be able to obtain a

conviction based on that transaction. However, counsel recalled that he explained to the petitioner that the audiotapes were not the only evidence against him, that there was corroborating evidence from the officers who had monitored the transactions.

Counsel denied telling the petitioner that he was going to be convicted because he was black. Counsel recalled that right after they picked the jury, the petitioner made a comment under his breath that he did not like the looks of the jury and wanted to know if the state's offer was still open. Counsel reiterated that it was the petitioner who initiated the plea, which shocked counsel because he was ready for trial. Counsel said that he discussed severing the cases with the petitioner and recalled that many of their discussions centered around what would happen if he were convicted after separate trials. Counsel stated that he did not have an independent recollection of telling the petitioner that the violation of probation would be consecutive to his other sentences but was sure he had because he discussed the topic with the prosecutor. Counsel did not recall the petitioner telling him he was on medication and said that if he did, he did not bring it up in a way that caused concern over the petitioner's competency.

On cross-examination, counsel testified that he obtained a mental evaluation of the petitioner as part of his standard practice even though he did not question the petitioner's competence. Counsel did not recall asking the petitioner about his education, but he was sure that was part of the initial interview. Counsel remembered that one of the audiotapes contained a voice that did not sound like the petitioner's voice. Counsel agreed that the day the petitioner pled, they were going to trial on two of the three cases against the petitioner. Counsel said he did not file a motion to continue the trial due to the petitioner not feeling well because the petitioner did not tell him he was not feeling well.

Counsel testified that he was "pretty sure" he got information from the district attorney about the confidential informant because he talked to the petitioner about him, and the petitioner said he knew him as "Lawnmower Man." Counsel recalled that the confidential informant was present the day of trial and said that he met the informant. Counsel admitted receiving a letter from the petitioner but said that he did not respond because he "set it in a stack of things to do and apparently forgot about it." Counsel stated that he was sure he discussed the discovery with the petitioner but did not recall giving the petitioner a copy of the materials. Counsel said that the petitioner mentioned that he did not live at the house where one of the drug transactions occurred. Counsel did not recall telling the petitioner that it was a bad sign the jury would not look at him.

After the hearing, the post-conviction court entered an order denying post-conviction relief, concluding that "counsel for [petitioner] at the trial level was not ineffective in his representation of the [petitioner] and that [p]etitioner's plea was, in fact, 'voluntarily, understandingly, and intelligently' made." In reaching this conclusion, the court noted that the petitioner had at least nine prior convictions and would have been a Range III offender had he taken any of his three cases to trial and been convicted. The court determined that the petitioner was familiar with court proceedings because of his numerous prior convictions, was the one who initiated the reopening of

plea negotiations, and received extensive advice from counsel and the trial court concerning the plea and its ramifications.

ANALYSIS

On appeal, the petitioner argues that he received the ineffective assistance of counsel which caused him to enter unknowing and involuntary guilty pleas. Specifically, the petitioner asserts that: counsel rarely met with him and when he did, the meeting centered around pleading guilty; counsel failed to provide him with discovery; counsel made no attempt to ascertain the identity of the confidential informant; and counsel intimidated him into pleading guilty

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

To establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A fair assessment of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 697; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Strickland*, 466 U.S. at 697.

When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must show a reasonable probability that, but for the errors of his counsel, he would not have pled guilty. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Adkins v. State*, 911 S.W.2d 334, 349 (Tenn. Crim. App. 1994). When determining the knowing and voluntary nature of the guilty plea,

the standard is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *see also State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). In making this determination, the court must consider:

> the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citations omitted). A petitioner's solemn declaration in open court that his or her plea is knowing and voluntary creates a formidable barrier in any subsequent collateral proceeding because these declarations "carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

Upon review, we discern no deficiency in counsel's performance. At the hearing, counsel testified that he met with the petitioner a couple of times to get acquainted and then had more intensive meetings about the evidence, potential problems, and possible resolutions of those problems as the trial date neared. Counsel stated that he explained the evidence the state planned to use to corroborate the audiotapes of the drug transactions. Counsel said that he was sure he discussed the discovery with the petitioner even if he did not give the petitioner a copy of the discovery materials. Counsel remembered discussing the confidential informant with the petitioner because the petitioner said he knew him as "Lawnmower Man." Counsel testified that he was ready to go to trial, and it was the petitioner who initiated plea negotiations after the jury was selected. The petitioner has failed to show that counsel's performance was not within the range of competence demanded of an attorney in a criminal case. *See Baxter*, 523 S.W.2d at 936.

In addition, the petitioner has failed to prove that any deficiency on counsel's part caused him prejudice, i.e., that he would have insisted upon going to trial but for the alleged deficiency, or that his pleas were other than knowing and voluntary. The record shows that the petitioner was familiar with criminal proceedings because of his numerous prior convictions. The record also shows that the petitioner faced a harsher sentence if convicted by a jury because he was a Range III offender. It was after the jury was selected for trial in two of his cases that the petitioner, of his own volition, asked if the state's offer was still open. The transcript of the plea hearing reflects that the petitioner understood his pleas, understood the sentences he would receive, was not coerced into pleading guilty, and was satisfied with counsel's representation. Accordingly, we conclude that the petitioner's guilty pleas were a "voluntary and intelligent choice among the alternative courses of action open to the [petitioner]." *Alford*, 400 U.S. at 31.

CONCLUSION

Following our review, we conclude that nothing in the record preponderates against the post-conviction court's finding that the petitioner knowingly and voluntarily pled guilty with the effective assistance of counsel. Therefore, we affirm the denial of post-conviction relief.

_____

J.C. McLIN, JUDGE